

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 13, 2009

STATE OF TENNESSEE v. JEROME ANTOINE BROWN

**Direct Appeal from the Circuit Court for Rutherford County
No. F-58533A Don R. Ash, Judge**

No. M2008-00546-CCA-R3-CD - Filed September 8, 2009

Pursuant to a plea agreement, the Defendant, Jerome Antoine Brown, pled guilty to possession of a Schedule II drug and tampering with evidence and received an effective sentence of twelve months in jail followed by ten years of probation. Subsequently, because the Defendant failed a drug screen and failed to report, the trial court found that the Defendant violated his probation, and ordered him to serve his sentence in prison. The Defendant now appeals, claiming that the trial court erroneously revoked his probation and that he received the ineffective assistance of counsel when he pled guilty. After a thorough review of the record and the applicable law, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

Bert W. McCarter, Murfreesboro, Tennessee, for the Appellant, Jerome Antoine Brown.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Renee W. Turner, Assistant Attorney General; William Whitesell, District Attorney General; Loral Hemenway and Jude Santana, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Background

On August 7, 2006, the Defendant pled guilty to one count of possession of a Schedule II drug and one count of tampering with evidence. The Defendant pled guilty as a Multiple Offender,

and he agreed to a ten-year sentence for the possession charge and a three-year sentence for the tampering charge. The sentences were to be served concurrently, with the Defendant serving one year of incarceration followed by probation. The “Special Comments” section of the possession of a Schedule II drug judgment reads “Defendant agrees to plea out of range. Defendant shall serve his sentence upon his first violation of probation [and] waive application for suspended sentence.”

The Rutherford County Circuit Court issued an initial warrant for the Defendant for violating two terms of his probation: (1) breaking the laws of the State of Tennessee; and (2) using intoxicants. According to the warrant, the Defendant failed a random drug screening test. An amended warrant was subsequently filed against the Defendant asserting that the Defendant had also violated his probation agreement by: (1) failing to verify his employment; (2) failing to report to his probation officer as instructed; (3) failing to submit to random drug testing; and (4) failing to pay various fees associated with his probation and court costs. The warrant was then amended a second time to include that the Defendant violated the terms of his probation by driving on a suspended license. The trial court then held a probation revocation hearing.

B. Probation Revocation Hearing on December 10, 2007

At the Defendant’s probation revocation hearing, the parties stipulated to the fact that the Defendant failed a drug screening test, thereby violating his probation. After the stipulation, the Defendant testified that he pled guilty in August 2006 to possession of a Schedule II drug, and he was sentenced to serve ten years. The Defendant recounted that he did not remember signing any agreement stating that, if he violated his probation, he would serve his sentence. The Defendant stated that he agreed only to serve a split confinement where he served a year and was then released on probation. The Defendant testified that his probation officer was Phil Duncan, who would call the Defendant telling him when to report. The Defendant admitted that he stopped reporting to Duncan in April 2007 because Duncan neither told him when to report nor returned the Defendant’s calls. The Defendant explained that he was assigned a new probation officer, but he never reported to that officer. The Defendant also admitted that he failed a drug screen and that he was charged with driving on a suspended license. Discussing his drug use, the Defendant said that he “got loose” when he was released but that he had since learned of Guardian Angels Ministry, a drug addiction program. The Defendant pointed out to the court that he did not have any violent offenses and that he wanted to obtain help for his drug problem.

After hearing the testimony, the trial court revoked the Defendant’s probation and denied the Defendant’s request for alternative sentencing. According to the “violation of probation order” entered following the hearing, the case was “reset for 1/7/08 to show proof of prior agreement to serve.”

C. Hearing on January 7, 2008

On January 7, 2008, the trial court held a “show-cause” hearing, where the following evidence was presented: The Defendant testified that he had reviewed a transcript of his guilty plea.

He said that his counsel at that time advised him to accept the plea offer for probation. Additionally, the Defendant testified that, as he understood the plea agreement, if he was charged on the same offenses (possession of a Schedule II drug and tampering with evidence) again, he would lose his probation. The Defendant said he did not understand that he could lose his probation if he violated any of the probation terms.

The trial court again denied the Defendant's request for alternative sentencing, and ordered the Defendant to serve his sentence in prison.

II. Analysis

On appeal, the Petitioner claims that: (1) the trial court erred by failing to place the Defendant in an "alternative sentencing" program after revoking the Defendant's probation; and (2) he received the ineffective assistance of counsel in conjunction with his guilty plea.

A. Probation Revocation

The Defendant claims that the trial court erred when it denied him an alternative sentence after revoking his probation because his criminal record was not violent and because he was seeking help for his drug addiction. The State argues that the Defendant admitted that he violated his probation, and the trial court properly exercised its discretion when it ordered the Defendant to serve the rest of his sentence incarcerated.

When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. T.C.A. § 40-35-311(e) (2006). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. *State v. Hunter*, 1 S.W.3d 643, 644 (Tenn. 1999); *see* T.C.A. §§ 40-35-308, 310, 311 (2006). The defendant has the right to appeal the revocation of his probation and entry of his original sentence. T.C.A. § 40-35-311(e). Upon a finding of a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered" *Id.*; *accord Hunter*, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension" T.C.A. § 40-35-310.

Relative to when a trial court may revoke probation and to the standard of review in an appeal of such an action, our Supreme Court has stated:

We take note that a trial judge may revoke a sentence of probation or a suspended sentence upon a finding that the defendant has violated the conditions of his

probation or suspended sentence by a preponderance of the evidence. T.C.A. § 40-35-311. The judgment of the trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion. *State v. Williamson*, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981). In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment. *State v. Milton*, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984).

State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

When the trial court denied the Defendant's request for alternative sentencing, it cited his multiple violations of his probation:

[I]n making a determination whether or not you violated your probation or what I'm to do there are a number of things I look at. First of all, was the violation of order of protection or violation of probation warrant filed prior to the expiration of your sentence. It was. Next, have you been provided counsel. You have been. Next, I've got to find by a preponderance of the evidence that you have violated your probation. And you violated your probation in a number of ways. First, you failed a drug screen. Secondly, you failed to report for almost six months. Based upon all that I'm going to find that I am going to revoke your probation.

In our view, the trial court appropriately revoked the Defendant's probation. The Defendant admitted that he both failed his drug test and failed to report to his probation officer, which were violations of his probation. Further, the trial court's ordering the Defendant to serve his sentence in prison was within its discretion. *See Hunter*, 1 S.W.3d at 644; *see also* T.C.A. §§ 40-35-308, 310, 311. The Defendant is not entitled to relief on this issue.

B. Ineffective Assistance of Counsel

The Defendant asserts on appeal that his counsel at his guilty plea misinformed him about the terms of his probation.¹ The Defendant alleges that he did not receive the effective assistance

¹The State argues that because the Defendant did not raise the issue of ineffective assistance of counsel at the probation violation hearing, he is precluded from raising that issue for the first time on appeal. Although it is a close question, we conclude that the Defendant's testimony in the trial court was sufficient to raise the ineffective assistance of counsel issue, and, thus, we address the issue on appeal.

of counsel because Counsel did not explain to him that if he violated any rule of his probation, he could be ordered to serve his entire sentence. Further, the Defendant alleges that he did not understand or know about the language in the “Special Comments” section of the judgment form stating that the Defendant could serve his sentence upon his first violation of probation.

While ineffective assistance of counsel claims may be brought initially for review on direct appeal, this Court has repeatedly warned that such a practice is “fraught with peril” because “it is virtually impossible to demonstrate prejudice as required’ without an evidentiary hearing.” *State v. Blackmon*, 78 S.W.3d 322, 328 (Tenn. Crim. App. 2001) (citations omitted). Generally, the following two-prong test directs a court’s evaluation of a claim for ineffectiveness of counsel:

First, the [petitioner] must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989). However, when a defendant pleads guilty, for the defendant to succeed on an ineffective assistance of counsel claim, he must show that but for counsel’s deficiency, he would have gone to trial instead of entering the plea of guilty. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

The Defendant claims that because his counsel at the guilty plea hearing did not correctly explain to the Defendant that any violation of the rules of probation could result in the Defendant “losing” his probation, the Defendant was prejudiced. In our view, the trial court did not find the testimony of the Defendant to be credible as to this assertion. A copy of the transcript from the guilty plea hearing was provided to the Defendant for review. After questioning from his counsel regarding his understanding of the plea, the trial court pointed to specific language in the transcript indicating the Defendant understood the plea, “But sir, my question to you says if you violate, on the first time you’re going to serve your sentence. It doesn’t say violate on the same exact charge.” The Defendant responded that regardless of what the judgment said, he understood it to say he would only serve his sentence if he was charged with the same type of crimes for which he was convicted and placed on probation. A logical conclusion to be drawn from the Defendant’s statement is that the Defendant believed that he could violate probationary rules, but so long as he did not commit more crimes identical to those for which he was convicted, his probation could not be “lost.” The trial court then denied the Defendant’s request for alternative sentencing and found the Defendant’s claim without merit. We agree with the finding of the trial court.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude that the trial court properly revoked the Defendant's probation and ordered him to serve the remainder of his sentence incarcerated and that the Defendant received the effective assistance of counsel when he pled guilty. As such, we affirm the trial court's judgment.

ROBERT W. WEDEMEYER, JUDGE